IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 6-4-2006

Coram:

The Honourable Mr. Justice T.V. MASILAMANI

S.A. No.1419 of 1997

1. Nanjappan
2. Palaniappan
3. Thirumalai
4. Pavayee @ Pavayammal
5. Velu .. Appellants/Defendants 1 to 4 and 6

vs.

1. Kandayammal @ Kandammal
2. Chandra
3. Pava
4. Kannammal
5. Minor Sarasu
6. Minor Amara
7. Alami
8. Rangan
9. Mallika
10. Velu (Minor)
11. Minor Chinnakkannu .. Respondents/Plaintiffs and
(Minors 5 & 6 rep. by Mother Defendants 5,7 to 14
Kannammal, 4th Respondent
Minors 10 & 11 rep. by
Guardian P. Geetha
Respondents 3 to 11 given up
as unneccessary parties)

Second Appeal against the judgment and decree dated 20.6.1997 made in A.S.No.113 of 1996 on the file of the Principal District Judge, Erode confirming the judgment and decree dated 27.6.1996 in O.S.No.131 of 1990 on the file of the Additional Subordinate Judge, Erode.

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For Appellants : Mr.T.Murugamanickam

For Respondents : Mr.M.M.Sundresh for R1 & R2
R3 to 11 Given up

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JUDGMENT

The defendants 1 to 4 and 6 who have lost before the both the courts below are the appellants.

2. The respondents/plaintiffs 1 and 2 are mother and daughter respectively. They filed the suit for declaration that the suit 'A' schedule property belonged to the plaintiffs absolutely and for possession of the same from the appellants/defendants and for mesne profits at the rate of Rs.7,000/- per year in respect of 'A' schedule lands and for partition and separate possession of 1/6th share in the suit 'B' schedule property in favour of the first plaintiff and for means profits at the rate of Rs.1,500/- per month in respect of 'B' schedule property.

3. The appellants filed the written statement resisting the claim of the respondents and the trial court, after analysing the evidence and upon hearing the argument of both sides, decreed the suit with costs for declaration and possession of 'A' schedule property and passed a preliminary decree for partition as prayed for in respect of 'B' schedule property and relegated the enquiry with reference to mesne profits in a separate proceedings under Order 20 Rule 12 C.P.C.

4. Aggrieved by the said judgment and decree, the appellants preferred the first appeal before the Principal District Judge, Erode in A.S.No.113 of 1996. Learned Principal District Judge having perused the recorded evidence in the light of the judgment and decree passed by the trial court, dismissed the appeal confirming the findings rendered by the learned Subordinate Judge in the suit. Hence the Second Appeal.

5. The parties to the proceedings may be referred to hereunder as they were arrayed before the trial court.

6. The brief facts leading to filing of this Second Appeal may be stated as under:-

(a) The suit properties originally belonged to Karuppanna Gounder by virtue of the registered sale deed dated 22.11.1955. The first plaintiff and the 4th defendant are the daughters born to the said Karuppanna Gounder and Angayee Ammal. The first plaintiff and the 4th defendant are the daughters and the defendants 1 to 3 and the father of 5th defendant, namely, Chellappan are the sons of the said Karuppanna Gounder and his wife Angayee Ammal. The said Karuppanna Gounder executed a registered settlement deed dated 17.8.1970 in respect of 'A' schedule properties in favour of his wife Angayee Ammal and she was in possession and enjoyment of the properties in her own right as per the settlement. Subsequently, he executed another settlement deed dated 17.8.1973 in respect of the suit first item of

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the 'B' schedule property in favour of his wife Angayee Ammal and she was in possession and enjoyment of the same in her own right. Later the said Angayee Ammal executed the registered Will dated 8.1.1988 bequeathing 'A' schedule property in favour of the plaintiffs 1 and 2 and thereby the first plaintiff was given life interest and after her death vested remainder to the second plaintiff. Similarly by the same Will and testament she bequeathed the suit first item in the 'B' schedule property in favour of the 4th defendant and later she died on 6.4.1988. Hence the plaintiffs have became entitled to the 'A' schedule properties and the 4th defendant was entitled to the first item in the 'B' schedule properties.

(b) The plaintiffs have therefore filed the suit claiming their share in the first item of the 'B' schedule properties also after the death of Karuppanna Gounder. They are entitled to a share in the second item of 'B' schedule property along with the other sharers. Hence the plaintiffs have claimed their share in the suit 'B' schedule property and also called upon the defendants to deliver the possession of the 'A' schedule property and issued notice to which the defendants have given a reply with false allegations.

(c) However, the defendants had denied that the suit properties belonged to Karuppanna Gounder as his self-acquired property. According to them, the properties originally purchased by Karuppanna Gounder belonged to the joint family as the income of the joint family members had also been utilised to purchase the properties. Therefore they have contended that the settlement deeds dated 17.8.1970 and 17.8.1973 are not valid and binding. Similarly, the father had no night to settle the joint family properties in favour of the mother and consequently, the said settlement deed executed sham and nominally cannot have any binding force in respect of the share of the defendants in the properties. They have also contended that the settlement deeds came into existence in order to save the properties from the clutches of the creditors of their father Karuppanna Gounder. Similarly, the Will dated 8.1.1988 had not been executed by the mother Angayee Ammal in a sound and disposing state of mind. Moreover, she had no right or title to the said properties so as to bequeath the same in favour of the plaintiffs and the 4th defendant under the said Will. Hence neither the plaintiffs nor 4th defendant have any right or title to the suit properties by virtue of the Will alleged to have been executed by the mother.

(d) The 4th defendant executed the release deed dated 12.4.1988 out of her own volition after receiving Rs.5,000/- from her brothers. Since the first plaintiff demanded more, the brothers did not agree to pay huge sum to get a release deed from her. In the above circumstances, the defendants have refuted the claim made by the plaintiffs in the suit.

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7. Heard Mr.T.Murugamanickam, learned counsel for the appellants and Mr.M.Sundresh, learned counsel for the respondents.

8. Learned counsel for the appellants has submitted as follows:-

The lower appellate court ought to have allowed the appeal as Karuppanna Gounder has no right or title to settle the suit properties and that the plaintiffs have not proved the due execution of the Will alleged to have been executed by Angayee Ammal as she had no valid title to bequeath the properties in favour of the plaintiffs. Similarly, the mere purchase made in the name of the kartha of the family, namely, Karuppanna Gounder would not confer exclusive title on him in respect of the suit properties particularly when there had been sufficient nucleus in the joint family for purchase of the same. Settlement deeds Exs.B-6 and B-7 were executed sham and nominally to save the properties from the clutches of creditors and therefore the said documents were not acted upon. Therefore mere admission of the defendants in their reply notice prior to suit will not confer title on the plaintiffs. The genuineness of the Will had not been proved in accordance with law. Even otherwise the suit is not maintainable under Section 119 of the Indian Succession Act.

9. In the above circumstances, the following substantial questions of law were formulated by this Court on 16.10.1997 for consideration:-

> (1) Whether the suit is maintainable in view of the specific provision of Section 119 of the Indian Succession Act?
>
> (2) Whether the plaintiffs can be absolved of their burden to prove their title from that of their predecessor-in-title and her right to bequeath the property merely because of an admission made by the defendants in pre=suit notice?

10. The learned counsel for the appellants has contended at the out set in his argument that the suit properties were not the self-acquired properties of Karuppanna Gounder, merely because the same had been purchased under Ex.A-1, registered sale deed dated 22.11.1955 in his name and therefore he has urged that since the sons of Karuppanna Gounder had also contributed for the acquisition of the properties, the same should be considered as joint family properties. As has been rightly contended by the learned counsel for the respondents, the evidence on record does not support such contention of the appellants for the simple reason that the burden of proving the contribution made by the sons also in the acquisition of the properties under Ex.A-1 in the name of the father had not been duly discharged by the defendants. On a careful perusal of the recorded evidence, this Court finds that the defendants have not discharged the burden of proving that the suit

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properties were acquired out of the joint family funds and therefore the concurrent findings of fact rendered by both the courts below on this aspect of the matter are sustained.

11. Similarly, the contention put forth by the defendants that the settlement deeds executed by Karuppanna Gounder (vide) Exs.A-2 and A-3 were sham and nominal and that they were brought in order to save the properties from the clutches of the creditors of the settlor cannot also be countenanced for the simple reason that the defendants have not adduced acceptable evidence so as to prove such contention. As has been rightly contended by the learned counsel for the plaintiffs, no scrap of paper has been produced by the defendants to show that any one of the creditors proceeded against the said Karuppanna Gounder and that therefore in view of the execution proceedings taken out by the creditors, the settlement deeds were executed.

12. But, on the contrary, the evidence on record would indicate that not only accepting the said settlement deeds that they were acted upon, but also conceding the factum of settlement made by the father, the defendants issued the reply notice Ex.A-9 and the 4th defendant executed the release deed under Ex.A-10 dated 12.4.1988 immediately after the death of the mother Angayee Ammal. Having regard to such factual aspects of the matter as discerned from the evidence, this Court is unable to accept the argument now put forth by the learned counsel for the appellants.

13. Similarly, the execution of the Will Ex.A-4 dated 8.1.1988 was held to have been proved by both the courts below after having appreciated the evidence on record and therefore the contention that the requirements of Section 69 of the Evidence Act have not been complied with has no basis for the simple reason that the plaintiffs have examined the attestor of the Will so as to prove the same. Therefore this Court is of the opinion that they have succeeded in proving the execution of the last Will and testament of the testator Angayee Ammal under Ex.A-4. It is no doubt true that the first plaintiff was given life interest and the second plaintiff had been vested with absolute right and title to the property covered by the Will. The learned counsel for the appellants has contended that in view of Section 119 of the Indian Succession Act, 1925, the bequest to the plaintiffs is not valid under law.

14. It is appropriate to extract Section 119 of the said Act hereunder so as to appreciate the contentions now put forth by the learned counsel for the appellants:-

> "119. Date of vesting of legacy when payment or possession postponed.-- Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing

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bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the Will, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he died before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be vested in interest.

Explanation.-- an intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the things bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives, or from a provision that, if a particular event shall happen, the legacy shall go over to another person."

15. The illustration (iii) to that provision of law is extracted hereunder:-

"(iii) A fund is bequeathed to 'A' for life, and after his death to 'B'. On the testator's death the legacy to 'B' becomes vested in interest in 'B'."

On a careful consideration of the said provisions of law in the light of the evidence in this case, this Court is of the considered view that the bequest made by the deceased Angayee Ammal in favour of the first plaintiff during her life time and after her death, the vested remainder to the second plaintiff is valid under law.

16. In any view of the matter, both on the factual aspect and on question of law, the plaintiffs have in the opinion of this Court succeeded in proving the execution of the Will Ex.A-4. Hence, it follows that the 4th defendant is entitled to the first item of the plaint 'B' schedule property as per the last Will and testament of her mother Angayee Ammal under Ex.A-4. In this view of the matter, this Court finds that the decrees passed by the courts below have to be modified suitably so as to confer title in respect of the suit first item of plaint 'B' schedule on the 4th defendant.

17. Though the learned councel for the respondents has contended that in view of the release deed executed by the 4th defendant under Ex.A-10, the first plaintiff is also entitled to 1/6 share in the suit 'B' schedule properties also, it could be seen on a fair reading of Ex.A-10 that the release deed was not executed with reference to the first item of the 'B' schedule properties. Therefore this court is unable to accept the contention of the learned counsel for the respondents to hold that in view of Ex.A-10 release deed, the plaintiffs are entitled to a share in the first item of the 'B'

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schedule properties also.

18. Having regard to the above facts and circumstances in the light of the evidence, this court finds that the appeal has to be partly allowed in respect of the first item in the plaint 'B' schedule properties and the impugned judgments and decrees passed by the courts below have to be suitably modified and the appeal has to be dismissed confirming the judgments and decrees passed by the both the courts below in respect of other items of 'A' and 'B' schedule properties.

19. Thus the Second Appeal is partly allowed in respect of the first item in the plaint 'B' schedule property and the impugned judgments and decrees passed by the courts below are suitably modified. In other respects the appeal is dismissed confirming the judgments and decrees passed by the courts below in respect of other items of the suit 'A' and 'B' schedule properties. However, there is no order as to costs.

dpp/ts

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1. The Principal District Judge, Erode.
2. The Additional Subordinate Judge, Erode.
3. The Section Officer, V.R.Section, High Court, Madras.

ONE CC TO MR.M.M. SUNDRESH, ADVOCATE (SR 17562)

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